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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL C. DELEW, *et al.*,

Petitioners,

v.

JANET KATHLEEN WAGNER, *et al.*

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner Michael C. DeLew, individually, Michael C. DeLew as Special Administrator of the Estate of Erin Rae DeLew, H. Roy Mayberry, and Vickie Mayberry (the "DeLews") submit this combined reply to the responses to the DeLews' Petition for Writ of Certiorari filed by Respondents Janet Wagner ("Mrs. Wagner") and Las Vegas Metropolitan Police Department, Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner, and Officer Greg Goen (collectively referred to as the "Police Defendants").[1]

I.

THE POLICE DEFENDANTS' RESPONSE UNDERSCORES THE FLAWS OF THE NINTH CIRCUIT'S HOLDING THAT ADJUDICATION OF THE STATE TORT ACTION IS ALWAYS A PREREQUISITE TO PURSUIT OF A § 1983 ACTION; THIS COURT SHOULD REVIEW THE DECISION TO CORRECT THIS ERROR.

The Police Defendants attempt to defend on ripeness grounds the Ninth Circuit's dismissal of the DeLews' § 1983 claim. Respondent LVMPD's Brief in Opposition to Petition for Writ of Certiorari ("Police Defendants' Resp.") at 9-13. They further argue that the dismissal pending the outcome of

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[1] This reply is primarily to the Police Defendants' opposition brief. Although Mrs. Wagner's opposition brief purports to respond to the DeLews' Petition for Writ of Certiorari, it is in fact an additional brief in support of her Conditional Cross-Petition for Writ of Certiorari. Because the arguments in Mrs. Wagner's opposition brief have nothing to do with the narrow issue as to which the DeLews seek certiorari review, the DeLews do not burden the Court with a reply to the non-responsive and essentially irrelevant arguments in Mrs. Wagner's filing.

the state wrongful death action was a proper deferral of the DeLews' claims until the amount of their damages becomes established beyond "pure conjecture." *Id.* at 17. However, the Ninth Circuit makes no mention of ripeness in its brief and cryptic discussion of the dismissal of the DeLews' claim; nor does the court suggest that it dismissed based on uncertainty as to the amount of the DeLews' damages:

> To prevail on their claim, the DeLews must demonstrate the defendants' cover-up violated their right of access to the courts by rendering "any available state court remedy ineffective." However, because the DeLews' wrongful death action remains pending in state court, it is impossible to determine whether this has in fact occurred.
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> . . .
>
> We conclude that the district court should have recognized the cognizability of the DeLews' claims and dismissed their complaint without prejudice. By disposing of the case in this fashion, the DeLews would have the opportunity to re-file their section 1983 action if in fact the defendants' alleged cover-up actually rendered all state court remedies ineffective.

DeLew v. Wagner, 143 F.3d 1219, 1222-23 (9th Cir. 1998).

What the Ninth Circuit did was not based on ripeness or damages principles. Instead, the court adopted an arbitrary rule that a § 1983 plaintiff *never* can even attempt to establish the ineffectiveness of "all state court remedies" until the completion of the state case. This Court should grant the DeLews' petition in order to review this novel holding which,

as the DeLews discuss *infra* at 5-10, finds no support in decisions of this or other courts.

This Court's review is especially warranted because it has neither considered the dimensions nor decided the procedural ramifications of the right of meaningful access to the courts where a governmental cover-up is alleged. Cover-up claims are fundamentally different from the inadequate-prison-law-library-and-paralegal-support claims that the Court considered most recently in *Bounds v. Smith*, 430 U.S. 817 (1977), and *Lewis v. Casey*, 518 U.S. 343 (1996). A cover-up, by definition, involves affirmative misconduct by a state actor to destroy, falsify, or conceal evidence; by contrast, the prisoners' suits alleging denial of access to the courts challenged relatively less sinister official *in*action.

Cover-up claims differ from prisoner suits in another important respect: A cover-up may result, as it did in this case, in the irretrievable loss of unique and critical evidence, with concrete and immediate injury to the citizen-victim. This injury is real and instant notwithstanding the victim's possible ability to file and prosecute an action challenging the underlying wrong; while that claim may proceed, it will do so like a wounded bird—crippled by the irreparable damage done through the cover-up. This quality of a successful cover-up—one that "succeeds" in permanently depriving a citizen of vital evidence—warrants a rule of law that such claims may proceed even before the conclusion of the separate but handicapped lawsuit for the original wrong. Any other outcome would reward police and other state actors for their affirmative misconduct in the cover-up by further delaying justice where justice already has been inexcusably assaulted and delayed.

Here, the DeLews alleged specific affirmative acts that resulted in the destruction or unavailability of critical evidence. *See* Supplemental Appendix to LVMPD's Brief in Opposition to Petition for Writ of Certiorari 7-8 (Complaint) at ¶¶ 22(a)-(j). By removing Mrs. Wagner from the scene of the collision

and by responding falsely to the inquiry of an investigating state patrolman about the smell of alcohol on Mrs. Wagner's breath, the Police Defendants blocked the timely collection of adequate blood for testing, which was the most critical evidence of her intoxication. The effect was to render the evidence of alcohol found in her blood more than three hours later inadmissible in a criminal trial under Nevada law and compromised in any civil action. Other affirmative acts included (a) the Police Defendants' preparation of fabricated witness statements (and their decision *not* to take statements from other percipient witnesses), (b) their deliberate deviation from standard investigation procedures regarding the preservation of skid marks and the performance of a field sobriety test, and (c) their false statements to the DeLews, to the coroner's office, and in their official reports, which dishonestly placed the blame for the collision on Erin DeLew rather than Mrs. Wagner.[2]

Against this background, Mrs. Wagner's statement that the DeLews have had "free, complete and total access to the accident investigation and facts surrounding this accident," Respondent's Brief in Opposition ("Wagner's Resp.") at 2, is

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[2] The Police Defendants accuse the DeLews of "unsupported histrionics" in their statement of the case. Police Defendants' Resp. at 5. But there is nothing either unsubstantiated or overblown about the DeLews' recitation of the facts. Rather, the DeLews properly rely on the allegations of their complaint, which must be construed in the light most favorable to the DeLews. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Only the defendants are playing fast and loose with the facts—both by straying outside the complaint to one-sided testimony and exhibits, and by asserting as "fact" points that have no support whatsoever in the record below. *See, e.g.*, Police Defendants' Resp. at 5 n.7, 6 (discussing statement of purportedly "independent" witness Susie Olsen (Mrs. Wagner's neighbor) and Mrs. Wagner's self-serving deposition testimony), 18 (claiming without any record support—and contrary to F.R.E. 408—that Mrs. Wagner is "virtually impecunious" and that her insurance company has offered to settle the DeLews' claims for the full amount of her insurance policy).

patently false. *See also* Police Defendants' Resp. at 7, 13. The DeLews will not have "complete and total access" to at least two critical facts: just how drunk Mrs. Wagner was when she hit Erin DeLew, and how the collision occurred, specifically, whether Mrs. Wagner ran Erin down, as the DeLews contend and the unrecorded physical evidence would have established. Moreover, Officer Wagner, who was the cover-up conduit between Janet Wagner and the Police Defendants, completely avoided any deposition, and Janet Wagner's deposition was limited, by their assertion of Nevada's marital privilege—denying the DeLews complete and total access to the facts. When, as here, the government cover-up has destroyed or falsified evidence going to the very heart of a citizen's claim for relief, there is necessarily a breach of the right of meaningful access to the courts; there is no good reason in fact, law or policy for forcing that citizen to pursue through completion a futile lawsuit to remedy the underlying wrong before the citizen may pursue his or her § 1983 claim.

The Court should grant the DeLews' petition in order to address the harshness of the Ninth Circuit's dismissal of the DeLews' constitutional claim pending the outcome of the state wrongful death action.

II.

THE POLICE DEFENDANTS ERR IN STATING THAT THE MAJORITY OF THE CIRCUITS AGREE WITH THE NINTH CIRCUIT; IN FACT, THE CIRCUITS HAVE DISAGREED AS TO WHEN A COVER-UP VICTIM MAY ASSERT A § 1983 CLAIM, AND THIS COURT SHOULD RESOLVE THAT CONFLICT.

The Police Defendants argue that the majority of circuits agree with the Ninth Circuit's dismissal of the DeLews' § 1983 claim until the completion of the state wrongful death action. Police Defendants' Resp. at 15. However, they are able to cite

to decisions of only three circuits as constituting this "majority." Of the three circuits they cite, none has issued an opinion that actually supports the Ninth Circuit's holding in this case. The uniformity among the circuits that the Police Defendants hail is in reality non-existent.

Far from majority agreement among the circuits on the impact of a claim for the underlying, covered-up wrong, the decisions reveal a genuine inconsistency in approach and result. In this case, the Ninth Circuit purported to follow the approach of the Sixth Circuit in *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), *cert. denied sub nom, Swekel v. Harrington*, ___ U.S. ___, 118 S. Ct. 978 (1998). However, the Ninth Circuit's adherence to *Swekel* was misguided at best.

The *Swekel* panel simply held that (a) a § 1983 plaintiff must establish that a police cover-up "foreclosed her from filing suit in state court or rendered ineffective any state court remedy she may have had," *id.* at 1263-64; (b) Mrs. Swekel failed to meet her burden of proof because she presented no evidence that the state court, if she had filed a state court action, could not have addressed the evidentiary problems created by the cover-up, *id.* at 1264; and (c) therefore, summary judgment was appropriate. *Swekel* further recognized that a § 1983 action based on a cover-up may be viable even where the victim has not attempted to file a separate tort action, where there is evidence that "it would be completely futile for a plaintiff to attempt to access the state court system." *Id.* at 1264 n.2. The Ninth Circuit transformed these fact-specific rulings in *Swekel* into a universal rule of law: a court *never* can decide the effectiveness or ineffectiveness of a suit challenging the underlying wrong until final adjudication of the underlying claim. *DeLew*, 143 F.3d at 1223.[3] The

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[3] If the Ninth Circuit had adhered to *Swekel*, it would not have dismissed the DeLews' claims. The complaint—the only factual material properly before the court for purposes of deciding whether to dismiss the claims against the Police Defendants—plainly alleges that the cover-up resulted in the destruction of critical evidence (including suitable blood

decision below is not consistent with, but rather departs significantly from the Sixth Circuit's analysis.

The Fifth Circuit, contrary to the Police Defendants' contentions, does *not* "limit[ ] the 'interference' associated with an alleged 'cover-up' to the filing of a complaint." Police Defendants' Resp. at 15. Rather, that court has held that a cover-up victim may proceed with a § 1983 claim without ever having filed suit to challenge the original wrong, much less without first adjudicating the underlying claim and then showing that any and all remedies are inadequate. *See Ryland v. Shapiro*, 708 F.2d 967, 975-76 (5th Cir. 1983). In *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994), the Fifth Circuit's most recent decision on the issue, the court had the chance to hold that the right of meaningful and unimpaired access to the courts extends only to the right to file suit, but the panel declined to so hold. Instead of dismissing the § 1983 claim because the plaintiff had filed suit in state court, the court chose to dispose of the case on qualified immunity grounds:

> The city officials counter that the right does not encompass a right to proceed free of discovery abuses by a governmental entity involved in a civil lawsuit in state court, *but protects only the right to institute the action*. In addition, they assert that even if a more broadly-based right exists now, it was not clearly established in 1985-88, the time of the alleged conduct. *We agree with this latter contention*.

Id. at 429 (emphasis added). To the extent that *Foster* may appear to tie meaningful access to the mere ability to file a state tort complaint, as the Police Defendants argue, *see* Police

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(cont'd.)..

draws, skid marks, witness identities and statements) greatly impairing their ability to obtain complete relief in their wrongful death action.

Defendants' Resp. at 15-16, the Fifth Circuit panel was discussing only the status of the law during 1985-1988 (for qualified immunity purposes), and not the law in 1994 when the cover-up began.

Once again, the Police Defendants err in stating that the Seventh Circuit approach is consistent with the decision below. In the seminal police cover-up case, *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), the Seventh Circuit permitted plaintiffs to proceed under § 1983 despite their filing and settlement of a wrongful death action twenty years earlier. Any intimation that the Seventh Circuit has retreated from *Bell* is baseless. In *Nielsen v. Clayton*, 62 F.3d 1419 (Table), 1995 WL 417569, at *7 (7th Cir. July 11, 1995), and *Stone v. City of Chicago*, 738 F.2d 896 (7th Cir. 1984), the district courts allowed the cover-up-based civil rights claims to be tried simultaneously with the claims based on the underlying wrongs. The Seventh Circuit affirmed both decisions. *Stone*, 738 F.2d at 899; *Nielsen*, 1995 WL 417569 at *7 ("The violation of the right of access to the courts, however, need not necessarily entail or result in the denial of a party's right to pursue a claim in court") (citing *Bell*).

The Police Defendants' reliance on *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995), and *Thompson v. Boggs*, 33 F.2d 847 (7th Cir. 1994), is likewise futile. In *Vasquez*, the Seventh Circuit simply held that plaintiffs' § 1983 claim could not proceed without "allegations claiming that the Vasquezes have been prevented from pursuing a tort action in state court or that the value of such an action has been reduced by the cover-up." *Vasquez*, 60 F.3d at 329. The court did *not* adopt a legal bar to § 1983 claims until completion of the state tort litigation (and proof of its actual ineffectiveness) in all cases. *Thompson* involved a fundamentally different set of circumstances. There, the claimed denial of meaningful access to the courts was based exclusively on police officers' alleged failure to state the plaintiff's allegations of excessive force in their police report. In dismissing the claim, the district court

correctly observed that "[t]here is a substantial difference between allegations that the police concealed or falsified documents and claims that the police failed to state a legal conclusion in a police report.'" *Id.* at 850 (quoting district court). Affirming, the Seventh Circuit held that plaintiff could not state a claim for deprivation of his right of access where "he was personally involved in the incident and thus had firsthand knowledge of all the facts and circumstances surrounding his arrest." *Id.* at 852. In that situation, the plaintiff could obtain effective redress of the claimed underlying wrong by providing the relevant information himself; therefore, the meaningful access claim was properly dismissed with prejudice for failure to state a claim. In this case, by contrast, the DeLews alleged an affirmative cover-up that permanently destroyed evidence which, due to her death, Erin DeLew *cannot* supply at the wrongful death trial. Here, unlike *Thompson*, the DeLews ability to prove their state wrongful death action has been impaired and impeded.

Other circuits—ignored by the Police Defendants—also do not follow the Ninth Circuit's approach in this case. *See Germany v. Vance*, 868 F.2d 9 (1st Cir. 1989) (remanding constitutional claim for trial); *Barrett v. United States*, 689 F.2d 324, 331-32 (2d Cir. 1982) (permitting right of access claim to proceed without requiring plaintiff to first show actual lack of success in separate Federal Tort Claims Act lawsuit).

In circuits that have not directly addressed this issue, the district courts likewise have not adopted the Ninth Circuit's draconian view. *See Stump v. Gates*, 777 F.Supp. 808, 816-19 (D.Colo. 1991) (allowing cover-up-based right of access claim to go forward without initial resort to state court); *Agresta v. Sambor*, 687 F.Supp. 162 (E.D. Pa. 1988) (permitting meaningful access claim to proceed without any resort to state court in order to prove inadequacy of state tort remedy); *Waller v. Butkovich*, 584 F.Supp. 909, 941 (M.D.N.C. 1984) (refusing to dismiss right of access claim because it could not

say that the plaintiffs would be unable to prove any set of facts establishing damages due to the cover-up).[4]

In short, there is anything but agreement between the circuits on this issue. While the right of access to the courts is well-recognized under the Constitution, the dimensions of that right when there has been a police cover-up are far from settled. When state actors take affirmative steps to cover-up wrongdoing and destroy and falsify critical evidence, victims should be able to obtain uniform protection of their right of access to the courts regardless of where the cover-up happened to occur. All other courts say the constitutional right to meaningful access is infringed where the defendants "hinder" or "impair" or "prejudice" the underlying claim. The impairment need not be complete or completely wipe out the claim. The Ninth Circuit now says that a plaintiff must show that "any" and "all" remedies were actually rendered ineffective. This is a much greater burden by a quantum leap. This Court should exercise its discretion on certiorari to reject an arbitrary rule requiring a cover-up victim to prosecute to conclusion a state tort claim in order to establish a deprivation of meaningful access to the courts in a § 1983 action.

CONCLUSION

The Court should grant the DeLews' Petition for Writ of Certiorari.

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[4] The Police Defendants quote selectively from *Waller* in their response at page 16. What they fail to mention is the ultimate holding in that case: "[T]he court cannot say the plaintiffs can prove no set of facts in support of [their denial of access claim] that would entitle them to relief. The extent and nature of their damages, if any, from the cover-up is a factual question that cannot properly be resolved on motions to dismiss." *Waller*, 584 F. Supp. at 941.

Respectfully submitted,

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